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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 767 60

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

CHARLES E. O'ROURKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR CHARLES E. O'ROURKE IN OPPOSITION

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (R. 59-64) is reported at 194 F. 2d 612. The opinion of the District Court (R. 44-49) is reported at 99 F. Supp. 506.

Jurisdiction

The judgment of the United States Court of Appeals was entered February 26, 1952 (R. 64-65). The petition for

a writ of certiorari was filed May 12, 1952. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254.

Statutes Involved

The statutes involved are the *Federal Employers' Liability Act* (45 U. S. C. A. Sec. 51 et seq.), *Safety Appliance Acts* (45 U. S. C. A. Sec. 1 et seq.) and the *Longshoremen's and Harbor Worker's Compensation Act* (33 U. S. C. A. Sec. 901 et seq.).

Statement

Respondent filed a complaint in the United States District Court for the Eastern District of New York seeking to recover money damages on account of injuries received. The complaint was based upon the Federal Employers' Liability Act, *supra,* and alleges a violation of the Safety Appliance Acts, *supra,* in that respondent's injuries were caused by a defective and inefficient hand brake on one of petitioner's freight cars. Petitioner moved to dismiss the complaint under the Federal Rules of Civil Procedure, Rules 12b (6), 56b and 56d. This motion (R. 37-38) was based upon the pleadings (R. 7-9), the deposition of respondent (R. 10-36), affidavit of counsel in support of the motion (R. 39-41) and affidavit of counsel in opposition to the motion (R. 42-43). The District Court held that the provisions of the Longshoremen's and Harbor Worker's Compensation Act, *supra,* hereinafter referred to as "Compensation Act", were applicable and that respondent's remedy thereunder was exclusive (R. 44-49).

The United States Court of Appeals for the Second Circuit reversed, with the majority opinion holding that respondent was a railroad employee injured while engaged in distinctive railroad work and was not employed in maritime employment at the time of his injury within the meaning of the Compensation Act so as to limit his rights thereby (R. 59-62).

As conceded by the petitioner, it employed respondent as a railroad freight brakeman in its yards at Jersey City, New Jersey (R. 19, 39). He was a regular member of a railroad drill crew consisting of an engineer, fireman, conductor and two freight brakemen (R. 14). Their job was to make up freight cars into trains in the petitioner's yard (R. 12). In these operations, respondent's duties concerned themselves only with the movement of trains and cars and the routine railroad procedures in connection therewith. This was the only type of work in which he participated and for which he was trained by the petitioner (R. 12).

From time to time, respondent's duties, as above noted, required him to work on car floats (R. 12). At the time he was injured he and his crew were preparing to move some freight cars from a car float moored in navigable waters. They proceeded onto the car float with a pusher engine and coupled to the lead car (R. 15). Respondent, as was his duty, then proceeded to release the hand brake on the cars on the float. When and if his duties as a freight brakeman took him upon car floats, his only tasks were to release hand brakes or "pull the pin or couple up" (R. 13). It was while attempting to release the brake on one of these cars that he was injured (R. 22-25). As alleged in his complaint (R. 5), respondent was caused, by reason of the defective and inefficient condition of the brake, in violation of the Safety Appliance Act, *supra*, to be precipitated from the car to the platform below. He sustained severe and permanent injuries.

Argument

The undisputed facts establish that respondent was a freight brakeman employed in operational railroading at the time of his injury. He was thereby engaged as a matter of law in railroad employment—an employment accompanied with the particular risks pertinent to the business of railroading. Accordingly, the Compensation Act does not apply and respondent must be allowed to proceed to enforce his substantial rights under the Federal Employers' Liability Act and Safety Appliance Act. To hold otherwise would be to disregard the constant and established course of liberal construction of these Acts followed by this Court. See *Urie* v. *Thompson*, 337 U. S. 163, 181-182 and *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 486.

The Compensation Act (Sections 902(4) and 903(a)) by indirection at least, includes within its coverage only those employees engaged in maritime employment who are injured upon navigable waters. These two factors—maritime employment and injury upon navigable waters—are separate and distinct provisions, each of which must be shown to exist before the Act applies. That an injury occurred upon navigable waters does not in and of itself require a finding of maritime employment. On this subject the position of this Court was made clear in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. It being conceded therein that Nogueira was injured upon navigable waters, the question was whether he was engaged in maritime employment. The *Nogueira* opinion relied heavily upon two cases to show that he was: *Atlantic Transport Company of West Virginia* v. *Imbrovek*, 244 U. S. 52 and *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, both of which held that the work of a stevedore in loading a ship was maritime in its nature and that he was thereby brought within admiralty jurisdiction. On this reasoning Nogueira, who was a freight handler actually doing the work of a

stevedore in loading freight into railroad cars on a float, was held to be engaged in maritime employment; accordingly, his exclusive remedy was under the Compensation Act. Concededly, this decision followed the purpose of Congress in legislating the Compensation Act; "* * * the purpose of the legislation (the Compensation Act) was to provide compensation for those who are mainly employed in loading, unloading, fitting and repairing ships", *Norton* v. *Warner Co.*, 321 U. S. 565, 569-570. Nogueira was obviously doing stevedoring work; the respondent here just as obviously was not so engaged but was in every respect performing the duties of an operational railroader. His was the very occupation and employment that the Federal Employers' Liability Act and Safety Appliance Acts were designed to protect. The purpose of the Federal Employers' Liability Act was to prescribe "a rule applicable where the parties are engaged in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto", *Southern Pacific Company* v. *Jensen*, *supra*. In this case respondent was unquestionably employed in "something having direct and substantial connection with railroad operations". *His work consisted literally and solely of running trains.* He was not doing stevedoring nor longshoreman's work nor engaged in maritime employment within the meaning of the Compensation Act and the decisions of this Court to which reference has been above made.

The decision of the district court was based upon the thesis that since the tort committed against respondent occurred over navigable waters it was therefore maritime and subject exclusively to the Compensation Act. No regard was given to the nature of his employment. It was urged that this "locality test" was the only "true meaning" to be derived from the *Nogueira* case, and that the precise task in which a "railroader" is engaged is immaterial (R. 48-49). Even the dissenting opinion in the

circuit court disagrees with this, for there it is stated that "it was his 'actual duties' at the time which controlled" (R. 64). It is obvious that under the Compensation Act the locus of the accident being on navigable waters is only one of two conditions that must be fulfilled before the remedy provided therein becomes exclusive. The other is the condition of maritime employment. When the *Nogueira* case was before the Circuit Court of Appeals for the Second Circuit (32 F. 2d 179), Judge Swan writing the opinion, it was stated: *"Moreover, it does not follow that the mere locus of the accident necessarily determines the right"* (at p. 182). There was no language in this Court's opinion in the same case which adversely affected that statement. A fortiori, this Court has affirmatively held that the fact that an employee is over navigable waters when injured does not itself determine that he is engaged in maritime employment. See *Grant Smith-Porter Co. v. Rohde*, 247 U. S. 469; *Rosengrant* v. *Havard*, 273 U. S. 664. In this case it is conceded that respondent's only duties were concerned with the releasing of handbrakes on railroad freight cars, or the coupling and uncoupling of these cars. This was a distinctive operational railroad activity relating only to the business of railroading. To conclude that the instant his railroad activities required him to step from land aboard a car float his employment automatically became maritime is to ignore reality. Such a conclusion can be reached only by making the locality of the accident the sole test of maritime employment. This reasoning finds no basis in the various statutes involved herein, in the intent of Congress nor in the decisions of this Court.

Petitioner's arguments both in the district court and the circuit court relied exclusively on the theory that merely because the locus of the accident was upon navigable waters respondent's only remedy was under the Compensation Act. Petitioner, at least tacitly, concedes now that this is only one of two conditions which must be fulfilled before the Act applies and that the nature of respondent's employment must also be shown to be maritime. In this re-

gard it is pertinent to note that the dissenting opinion in the circuit court apparently agrees with the majority opinion in every respect except as to the nature of this respondent's employment. As already noted the dissent states that it was respondent's actual duties at the time which controlled. And yet in almost the same breath his employment is categorized as being maritime apparently for no other reason than the fact that at the time of his injury he was physically over navigable waters. Reliance is placed on this Court's decision in *Parker* v. *Motor Boat Sales*, 314 U. S. 244. That case concerned a person employed as a janitor who was injured while actually operating a motor boat on navigable waters. If anything that case sustains respondent's position here, for the injured person in the *Parker* case was without question performing a maritime service. He was actually operating a boat. This is far different from operating a railroad freight car. It is inconceivable that the latter employment could be construed as maritime. The dissenting opinion in the circuit court here also relied upon this Courts' decision in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251. In determining whether an injured person was an employee within the coverage of the Compensation Act it was there held that "the question concerns his actual duties." What was the primary duty? See also *Merritt-Chapman & Scott Corp. et al.* v. *Willard et al.*, 2 Cir., 189 F. 2d 791. Here the respondent's conceded duties were actually and primarily those of an operational railroad freight brakeman. In *Baizley Iron Works* v. *Span*, 281 U. S. 222, 230, the question was whether an employee doing repair work was engaged in maritime service. In holding that he was this Court observed that;

> "What work has *direct* relation to navigation or commerce must, of course, be determined in view of surrounding circumstances as cases arise." (Emphasis supplied.)

In view of respondent's conceded actual and primary duties as a freight brakeman it is clear that his work had no relation whatsoever to navigation or commerce upon navigable waters. His physical presence on a moored car float does not change the character of his duties.

In the recent case of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 96, this Court stresses the fact that historically the work of a stevedore was a maritime service performed until recent times by members of the ship's crew. This same thesis was actually the basis of the decision in the *Nogueira* case. Petitioner now abandons the "locality test" theory it relied on in the lower courts and urges here that respondent's duties were essentially the same as those of the stevedore in the *Nogueira* case. Yet it is conceded that respondent was a freight brakeman whose only duties were in connection with the operation of railroad freight cars. Clearly the work of a brakeman engaged in operational railroading cannot properly be held to be a service formerly rendered by a ship's crew. It is completely disassociated from maritime service.

The *Safety Appliance Act, supra*, makes it unlawful for a railroad to provide its cars with other than efficient hand brakes. Respondent alleges in his complaint (R. 5) that he suffered his injury because of a violation of this Act. The recent case of *Coray* v. *Southern Pac. Co.*, 335 U. S. 520, was concerned with a violation of the Act because of a defective brake. The decision is highly pertinent here in that it clearly indicates those railroad employees whom the Act is intended to protect. This Court had this to say, at pages 522-524:

> "And this Act (Safety Appliance), fairly interpreted, *must be held to protect all who need protection* from dangerous results due to maintenance or operation of congressionally prohibited defective appliances. Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibitive defective equipment '*not from the position*

the employee may be in or the work which he may be doing at the moment when he is injured'." (Emphasis supplied.)

* * * * * *

"The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purpose."

In simple and unambiguous language this Court has said that no matter where an employee is working, no matter what type of work he may be doing at the moment he is injured, his employer railroad company is liable for injuries suffered as a result of the Act's violation. This language clearly provides for no exceptions. Petitioner has persistently ignored this concise statement of law in the district court, the circuit court and here. Nor may it escape liability thereunder "by the introduction of dialectical subtleties" whereby it has attempted to disguise the nature of respondent's employment.

Respondent was not engaged in maritime employment and therefore the Longshoremen's and Harbor Workers' Compensation Act has no application to this case. The decision of the Court of Appeals is in no way in conflict with the decision of this Court in *Nogueira* v. *New York, N. H. & H. R. Co., supra*, since the facts differ as to the nature of the employment in the two cases. Likewise there is no conflict as to the applicable principles applied by the Court of Appeals for the Second Circuit and those applied by the Court of Appeals for the Ninth Circuit in *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407, cert. denied, 284 U. S. 638. In the *Buren* case the employee's duties required him to ride a ferryboat across navigable waters in addition to his duties as a brakeman. In that regard there can be no question but that his duties were in part maritime. On the facts the two cases differ as to the nature of the employment of the respective employees. In view of the clear language of the

pertinent statutes and the distinct principles set forth by this Court in *Nogueira v. New York, N. H. & H. R. Co., supra,* and *Coray v. Southern Pac. Co., supra,* it is respectfully urged that there is no question of Federal law which need be resolved by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York, N. Y. June 12, 1952.